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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW VERBOSKY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A01-0601-CR-44
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0409-FB-11

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Matthew Verbosky appeals his convictions and sentence for Class B felony dealing in methamphetamine and Class B felony conspiracy to manufacture methamphetamine. We affirm in part, reverse in part, and remand.

Issues

Verbosky raises four issues, which we restate as:

I. whether his convictions for dealing in methamphetamine and conspiracy to manufacture methamphetamine violate Article 1, Section 14 of the Indiana Constitution;

II. whether the trial court properly excluded evidence regarding a prior conviction of a witness who testified against him;

III. whether there is sufficient evidence to convict him of dealing in methamphetamine; and

IV. whether the trial court properly sentenced him.

Facts

On September 11, 2004, Verbosky, his girlfriend, Mindy McCoy, and McCoy's daughter went to Gerilyn and Larry Parnell's house for a visit. While they were there, Verbosky asked Gerilyn if he could "gas off" some methamphetamine that he had previously "cooked," and Gerilyn said no. Larry, however, told Verbosky he could "gas off" the methamphetamine and arranged for Gerilyn to take her two children and McCoy's daughter out of the house while he, Verbosky, and McCoy started the "gassing off" process.

"Gassing off" is the last stage of the process of manufacturing methamphetamine, and it involves taking a "cooked" liquid containing ephedrine and turning it into a solid. As they began the "gassing off," a bottle of muratic acid used in the process was knocked over, and the room filled with smoke. Before the smoke cleared and they could complete the "gassing off," several police officers arrived at the Parnells' house to serve an arrest warrant for Gerilyn and to do a "house check" with the local Department of Family and Children. Tr. p. 207.

Verbosky was arrested, and on September 14, 2004, the State charged him with Class B felony dealing in methamphetamine and Class D felony possession of precursors. On November 15, 2005, the State amended the charges to include charges of Class B felony conspiracy to manufacture methamphetamine and Class B felony aiding in the manufacture of methamphetamine. On December 2, 2005, the possession of precursors and aiding in manufacture charges were dismissed. On December 13, 2005, a jury trial began, and the jury found Verbosky guilty of the two remaining charges. The trial court sentenced Verbosky to twelve years with four years suspended on each count and ordered the sentences to run concurrently. Verbosky now appeals his convictions and sentence.

Analysis

I. Double Jeopardy

Verbosky argues that his conviction for dealing in methamphetamine, which was based on him manufacturing methamphetamine, and his conviction for conspiracy to manufacture methamphetamine violate Article 1, Section 14 of the Indiana Constitution. To show that two challenged offenses constitute the same offense in violation of the

Indiana Construction under the "actual evidence test," a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish all the essential elements of one offense may also have been used to establish all the essential elements of a second challenged offense. Tyson v. State, 766 N.E.2d 715, 716-17 (Ind. 2002) (citing Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999)). Verbosky argues:

> Here, where both charged offenses occurred at the same place, among the same people, and involved the same physical actions, at the same time, it is reasonably possible that the evidence used by the jury to establish the essential elements of the conspiracy charge were also used to prove the essential elements of dealing.

Appellant's Br. p. 7.

The essential elements of the conspiracy charge are: (1) Verbosky (2) agreed with one or more other persons to commit the crime of dealing in a methamphetamine (3) with the intent to manufacture methamphetamine and (4) the defendant or one of the persons to the agreement performed an overt act in furtherance of the agreement. See Ind. Code § 35-41-5-2. The essential elements of dealing in methamphetamine are: (1) Verbosky (2) knowingly or intentionally (3) manufactured (4) methamphetamine. See I.C. § 35-48-4-1.[1]

In Tyson, our supreme court concluded that it was reasonably possible that the evidence used by the jury to establish the essential elements of the conspiracy to deal in a narcotic charges and dealing in a narcotic charges was the same because both were based

[1] In 2006, the Legislature amended this statute by deleting references to methamphetamine and enacted Indiana Code Section 35-48-4-1.1, which applies exclusively to methamphetamine and is substantially similar to 35-48-4-1. Our analysis is the same under both statutory schemes.

on the same deliveries of heroin. Tyson, 766 N.E.2d at 717. Tyson's conspiracy convictions were vacated.

Following Tyson, Verbosky claims that the overt act of the conspiracy and the dealing in methamphetamine are both based on the "gassing off" process. The State argues that the dealing conviction was based on evidence that Verbosky had begun the manufacturing process before he went to the Parnells' house. The State continues that the conspiracy charge is based on the agreement to "gas off" the methamphetamine after Verbosky arrived at the Parnells' house.

In support of this contention, the State points to the closing arguments in which the prosecutor stated Verbosky "was manufacturing it before he came." Tr. p. 309. Although the prosecutor did state such, he went on to argue that Verbosky "was cooking it before he came and he continued to manufacture it while he was there with their help." Tr. p. 309. The prosecutor also argued that to manufacture methamphetamine one need only start the process and that there need not be a final product to be convicted. See Bush v. State, 772 N.E.2d 1020, 1023 (Ind. Ct. App. 2002) (concluding that the statute does not require that the manufacturing process must be completed or that there must actually be a final product before it applies), trans. denied.

Because there is no evidence that Verbosky was making two separate "batches" of methamphetamine, we conclude that Verbosky was involved in only one incident of manufacturing methamphetamine. "Manufacture" is defined as:

> (1) the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural

> origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. . . . ; or
>
> (2) the organizing or supervising of an activity described in subdivision (1).

I.C. § 35-48-1-18.

As Gerilyn and Larry testified, there are numerous steps in the manufacturing of methamphetamine. We do not believe that this definition of "manufacture" supports the State's argument, which when followed to its logical conclusion would allow each step of the manufacturing process to justify to a separate conviction for dealing in methamphetamine.

That Verbosky had "cooked" or partially completed the manufacturing process before he went to the Parnells' house to "gas off" and complete the manufacturing process does not give rise to two separate incidents of manufacturing sufficient to support the convictions for dealing in methamphetamine and conspiracy to manufacture methamphetamine. Cf. Bush, 772 N.E.2d at 1024 (concluding that where there was no direct evidence that a "batch" of methamphetamine had been completed, "it is impossible to fairly state that the manufacturing and possession of precursors offenses in this case were clearly independent of each other . . . ."), with Iddings v. State, 772 N.E.2d 1006, 1017 (Ind. Ct. App. 2002) (concluding that where Iddings had already manufactured methamphetamine and possessed the chemical precursors of methamphetamine with the intent to manufacture more of the drug, Iddings's possession of chemical precursors of methamphetamine was not necessarily a lesser included offense of manufacturing

methamphetamine because the evidence permitted the reasonable conclusion that two independent offenses were committed for which Iddings could be separately punished), trans. denied. Because Verbosky was producing the same "batch" of methamphetamine both before and after he went to the Parnells' house, he has established a reasonable probability that the evidentiary facts used by the fact-finder to establish all the essential elements of the conspiracy charge were also used to establish all the essential elements of dealing. See Tyson, 766 N.E.2d at 715. Under the actual evidence test, both of Verbosky's convictions cannot stand. See id. Thus, we reverse and remand for the trial court to vacate Verbosky's conspiracy conviction.[2]

II. Exclusion of Evidence

Verbosky argues that the trial court improperly excluded evidence of Gerilyn's prior unrelated conviction for dealing in methamphetamine pursuant to Indiana Evidence Rule 404(b).[3] We review claims of error in the exclusion of evidence for an abuse of discretion. Brown v. State, 770 N.E.2d 275, 280 (Ind. 2002).

Indiana Evidence Rule 404(b)[4] provides in part:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

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[2] This conclusion is also consistent with the State's argument regarding the sufficiency of the evidence to support Verbosky's dealing conviction. The State argues, "Verbosky had begun the manufacturing process and had brought the ephedrine in liquid form to the Parnells' house to finish the process." Appellee's Br. p. 12.

[3] The State points out that Verbosky did not make an offer of proof regarding the prior conviction after the State's objection was sustained. Defense counsel explained to the trial court that Gerilyn has a conviction for "dealing in Switzerland County as well." Tr. p. 162. Because the State does not elaborate on this point, we will assume this was a sufficient offer of proof.

[4] Verbosky does not argue that this evidence is admissible under Indiana Evidence Rules 608 or 609.

> person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

The principal risks of unfair prejudice presented by uncharged misconduct evidence are that the jury will infer that the defendant is a bad person who should be punished for other, uncharged misdeeds, and that the jury will draw the forbidden inference that the defendant's character is such that he or she has a propensity to engage in conduct of the sort charged, and that he or she acted in conformity with that character on the occasion at issue in the charge. Garland v. State, 788 N.E.2d 425, 428-29 (Ind. 2003). As our supreme court concluded, evidence of other crimes, wrongs, or acts of witnesses other than the defendant may be admissible where the proffered evidence suggests that someone else had the motive, intent, level of preparation, plan, knowledge, identity, or absence of mistake or accident necessary to commit the crime for which the defendant is being tried. Id. at 429-30.

Here, Verbosky did not seek to offer the evidence of Gerilyn's prior conviction to show that someone else committed the crimes with which he was charged. It is undisputed that Gerilyn was not in the house when the "gassing off" process began. Instead, Verbosky argues that he sought to have the evidence admitted to correct the jury's impression of Gerilyn. This does not appear to be a purpose for which Indiana Evidence Rule 404(b) evidence of a witness other than the defendant may be admitted. See Garland, 788 N.E.2d 429-30.

Even if this is the type of evidence that our supreme court anticipated would be admitted in Garland, Gerilyn's testimony did not "open the door" to the admission of the prior conviction to correct a misleading or false impression of her involvement with methamphetamine as Verbosky argues. See Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000) ("In addition, otherwise inadmissible evidence may become admissible where the defendant 'opens the door' to questioning on that evidence."). Although Gerilyn testified that methamphetamine is an "evil" drug that makes people "crooked," the totality of her testimony did not leave the jury with a false impression of her involvement with methamphetamine. Tr. p. 144. Gerilyn explained in great detail the products used and the steps involved in the manufacturing of methamphetamine. She testified that she had seen it made "[q]uite a bit," and her familiarity with the manufacturing process was abundantly clear. Id. at 145. She indicated that although she denied Verbosky's request to "gas off" the methamphetamine at her house, Larry permitted him to do it. She stated that although she did not see the specific methamphetamine that Verbosky had already "cooked," she knew that he had it in a two-liter bottle in a box that he took to the back door of their house. She also testified that she had previously pled guilty to dealing in methamphetamine for her participation in this incident. As she explained, she knew Verbosky was going to make methamphetamine at her house and that is why she pled guilty.

On cross-examination, Gerilyn testified that she had smoked methamphetamine with Larry, McCoy, and Verbosky earlier that evening. Gerilyn's familiarity with the manufacturing process and her participation on the night in question was made clear to

the jury. There was no misleading impression that would have been corrected with evidence of an earlier conviction for dealing in methamphetamine. The trial court did not abuse its discretion in excluding this evidence.

III. Sufficiency of the Evidence

Verbosky also argues that there is insufficient evidence to support his conviction for dealing in methamphetamine because "there is no firm evidence that [he] brought any of the ingredients to the Parnell home, or that he did a single thing to commence the 'gassing off' process." Appellant's Br. p. 12. When reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must respect the jury's exclusive province to weigh conflicting evidence. Id. We may consider only the probative evidence and reasonable inferences supporting the verdict. Id. Said another way, we must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

To convict Verbosky of Class B felony dealing in methamphetamine, the State was required to prove that he knowingly or intentionally manufactured methamphetamine. I.C. § 35-48-4-1. Manufacturing includes the production, preparation, propagation, compounding, conversion, or processing of a controlled substance. I.C. § 35-48-1-18. The manufacturing process need not be completed to support a conviction for dealing in methamphetamine. Bush, 772 N.E.2d at 1023.

Gerilyn testified that Verbosky had contacted her the night before asking about "gasin' off some dope." Tr. p. 147. She testified that Verbosky asked her again when he came to her house and that Larry finally said yes. Gerilyn explained that "gassing off" is the last stage of making methamphetamine. She testified that although she never saw it, Verbosky had methamphetamine that he had already cooked in a two-liter bottle in a box in his trunk, that he carried a box out of the trunk to the back door, and that she knew Verbosky was going to "gas off" methamphetamine at her house. Gerilyn stated that Verbosky and McCoy had "cooked" the methamphetamine at their apartment or at McCoy's uncle's house.

Larry testified that Verbosky asked if he could "gas off" some methamphetamine that he had and that he would give the Parnells some of it. Larry stated that several of the precursors used to manufacture methamphetamine that were found in the house were brought there by Verbosky. Although they made the preparations to "gas off" the methamphetamine, Larry testified that they did not complete the "gassing off" process because they knocked over the bottle of muratic acid and then the police came. Larry also testified that everyone was aware that they were "gassing off" methamphetamine and that everyone was participating in it. Larry told the arresting officer that Verbosky had brought unfinished methamphetamine to their house to "gas it off." Tr. p. 219. The two-liter bottle found in the Parnells' basement contained a liquid form of ephedrine or pseudoephedrine. See Tr. p. 280.

Regardless of the fact that the process was not yet completed, a jury could reasonably infer that Verbosky was in the process of manufacturing methamphetamine.

He had "cooked" the methamphetamine before he arrived at the Parnells' house. After they arrived there, Larry, McCoy, and Verbosky prepared to "gas off" the methamphetamine he had "cooked" earlier. This is sufficient evidence to support his conviction for dealing in methamphetamine.

IV. Sentence[5]

Finally, Verbosky argues that although the trial court identified some aggravating and mitigating circumstances, it did not provide any evaluation of these factors nor did it "identify any specific facts and reasons leading to any findings regarding the aggravating and mitigating circumstances." Appellant's Br. p. 14. "Sentencing decisions are within the trial court's discretion, and will be reversed only upon a showing of abuse of discretion." Dickenson v. State, 835 N.E.2d 542, 555 (Ind. Ct. App. 2005), trans. denied.

> If a trial court uses aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, or to impose consecutive sentences, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances.

Crawford v. State, 770 N.E.2d 775, 782 (Ind. 2002).

At the sentencing hearing, the trial court explained:

> Mr. Verbosky has similar charges pending now in uh Switzerland County, Indiana. Jury trial scheduled to be heard on May the Ninth (9th), 2006. Actually, two (2) cases, I'm sorry. One filed in July of 2004 and one filed in September of 2004 in addition to the charges filed in this county in September of 2004. Um, he does have a prior felony

[5] The parties agree that the presumptive sentencing statutes apply to this case.

> conviction in the State of Ohio for assault. No other convictions other than what appear to be traffic related. . . . I am simply going to recite for the record my consideration and let the chips fall where they may. Um, probation department urges that uh Mr. Verbosky has a history of criminal and delinquent behavior. That he has recently violated the conditions of his release uh from Switzerland County. He was released on bond in Switzerland County at the time of his arrest for this offense. They also believe that he is a person likely to respond affirmatively to probation or short term imprisonment. I further find that uh uh Mr. Verbosky has apparently dealt with his addiction. He has on his own gone to, I don't recall the name of the program off hand, but at least claims to have been drug free since the time of his arrest and after treatment in this program. Um, considering these factors, the Court will sentence the defendant to twelve (12) years with the Indiana Department of Corrections and suspend four (4) years of that sentence.

Tr. pp. 353-54. The written sentencing order explains that Verbosky received concurrent twelve years sentences with four years suspended on each count.

Although the trial court did not expressly explain the weight it was giving to the factors it considered, it is clear that the trial court considered these factors before imposing Verbosky's sentence. We have previously acknowledged that a sentence enhancement will be affirmed in spite of a trial court's failure to specifically articulate its reasons if the record indicates that the court engaged in the evaluative processes. Kien v. State, 782 N.E.2d 398, 411 (Ind. Ct. App. 2003), trans. denied. Here the trial court's consideration of Verbosky's criminal history, the recommendation that he will respond well to a short term of imprisonment, and his sobriety in arriving at the twelve-year

sentence is indicative that it engaged in an evaluative process. Verbosky has not established that the trial court abused its discretion in sentencing him.[6]

Conclusion

Verbosky's convictions for dealing in methamphetamine and conspiracy to manufacture methamphetamine violate Article 1, Section 14 of the Indiana Constitution, and his conspiracy conviction must be vacated. The trial court did not abuse it's discretion in excluding evidence of Gerilyn's prior conviction for dealing in methamphetamine. There is sufficient evidence to support Verbosky's conviction for dealing in methamphetamine. Finally, Verbosky has not established that the trial court abused its discretion in sentencing him. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and ROBB, J., concur.

[6] Verbosky does not challenge the appropriateness of his sentence.